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## UNITED STATES PATENT AND TRADEMARK OFFICE

## Trademark Trial and Appeal Board

In re Aviation Technology Group, Inc.

Serial No. 78193396

Robert B. Schultz, V.P. General Counsel, for Aviation Technology Group, Inc.

Christopher S. Adkins, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Simms, Hohein and Bucher, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Aviation Technology Group, Inc. has filed an amended application to register on the Principal Register the mark "ATG AVIATION TECHNOLOGY GROUP, INC. PERFORMANCE AT A HIGHER LEVEL" and design, as reproduced below,



for the following goods and services: "simulators for training pilots" in International Class 9; "aircraft; jet aircraft, military manned and unmanned combat aircraft, civilian and military jet trainers and business and recreational jets" in

International Class 12; and "educational services, namely, aircraft pilot training services."

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods in International Class 12, so resembles the following marks, which are each registered for, inter alia, "aircraft; lighter-than-air craft; airships; dirigible balloons, aerial transportation vehicles, and structural parts and fittings for all the aforesaid goods" and are owned by the same registrant, as to be likely to cause confusion, mistake or deception: (i) the mark "ATG" and, as illustrated below,



<sup>&</sup>lt;sup>1</sup> Ser. No. 78193396, filed on December 11, 2002, which is based on an allegation of a date of first use anywhere and in commerce of December 5, 2002 with respect to all of the goods and services set forth above. The words "AVIATION TECHNOLOGY GROUP, INC." are disclaimed.

<sup>&</sup>lt;sup>2</sup> While, as noted above, applicant's application, as amended, also includes goods and services in International Classes 9 and 41, it is clear from both the Examining Attorney's final refusal and his brief that the refusal under Section 2(d) pertains solely to the goods set forth in International Class 12 of such application.

<sup>&</sup>lt;sup>3</sup> Although each of the cited registrations also lists "geostationary aerial platforms for telecommunication relays; and parts and fittings therefor" in International Class 9, it is plain from both the Examining Attorney's final refusal and his brief that the refusal under Section 2(d) is based exclusively on the goods identified in International Class 12 of each of such registrations.

<sup>&</sup>lt;sup>4</sup> Reg. No. 2,666,514, issued on December 24, 2002, which is based on United Kingdom Reg. No. 2237166, dated June 23, 2000.

(ii) the mark "ATG" and design. Registration has also been finally refused pursuant to Trademark Rule 2.71(a) and TMEP Sections 1402.06 and 1402.07 (3d ed. 2d rev. May 2003) on the basis that the amended identification of goods and services currently set forth is unacceptable because it is beyond the scope of the application as originally filed, which specified only "aircraft" in International Class 12.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusals to register.

We turn first to the refusal under Section 2(d) inasmuch as it is the sole issue which applicant has addressed in its briefs. Our determination under such section is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties. 6

<sup>&</sup>lt;sup>5</sup> Reg. No. 2,666,515, issued on December 24, 2002, which is based on United Kingdom Reg. No. 2237171, dated November 2, 2001.

<sup>&</sup>lt;sup>6</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." 192 USPQ at 29.

With respect to the similarity or dissimilarity in the goods at issue, applicant argues at length in both its main brief and its reply brief that there is no likelihood of confusion because its goods are in fact very different from those actually offered by registrant. Specifically, applicant insists in its main brief that:

Herein, the registrant identified its goods as "lighter-than-air craft, airships, dirigible balloons and geostationary aerial platforms." By contrast, the applicant's description is "jet aircraft, military manned and unmanned combat aircraft, civilian and military jet trainers and ... business and recreational jets." Thus[,] far from being "absolutely identical," [as asserted by the Examining Attorney, in actuality] applicant's and registrant's goods bear no similarity whatsoever.

Applicant additionally maintains in its main brief that it "is currently developing a very high performance two-seat two-engine fighter-like jet aircraft for both civilian and military customers," whereas "[r]egistrant's product is a blimp." Such goods, according to applicant's reply brief, are simply so different that "[i]t is truly a misnomer to call both products aircraft."

Furthermore, as asserted in its main brief, applicant notes that while "blimps and dirigibles (rigid frame blimps) were [historically] used for military purposes and transportation," the "primary use of blimps today is for marketing" and, thus, such goods are sold only "to large corporate buyers." However, according to applicant, it is also the case that:

Such corporations do not buy small high performance two seat jets. Applicant's jets, by contrast[,] are sold as sport or business

aircraft to individuals or small companies by distributors or directly by the applicant to government buyers as military aircraft. These customers and trade channels are entirely separate and apart from one another.

More importantly, the consumers of blimps and jet aircraft are the most sophisticated groups of buyers in the world and would not be confused about the source of the goods, regardless of the trademark Applicants' [sic] products similarities. range in price from \$2.5 million to \$4.5 million. Its customers are high net worth individuals, large corporations and governments. Similarly, blimps cost millions of dollars each and are purchased only by large corporations and governments. All of these groups are very sophisticated buyers who do not spend millions of dollars on impulse. Such purchases are made only after considerable due diligence.

Nonetheless, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are respectively identified in the application and the cited registration, and not in light of what such goods are asserted to actually be. <u>See</u>, <u>e.g.</u>, Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPO2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPO 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPO 76, 77 (CCPA 1973). It is also well established that a refusal under Section 2(d) is proper if there is a likelihood of confusion involving any of the goods set forth in the application and the cited registration, and that, where a likelihood of confusion is so

found, it is unnecessary to rule with respect to any of the other goods listed therein. See, e.g., Tuxedo Monopoly, Inc. v. General Mills Fun Group, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); and Shunk Mfg. Co. v. Tarrant Mfg. Co., 318 F.2d 328, 137 USPQ 881, 883 (CCPA 1963).

We consequently must agree with the Examining Attorney that, as identified, applicant's and registrant's goods are identical in part in legal contemplation inasmuch as both include the item "aircraft" among the goods which are respectively listed in the application and the cited registration. Applicant, as the Examining Attorney notes, has simply ignored such fact in its attempt to distinguish its goods from those of the registrant. The Examining Attorney is correct, however, in pointing out that because both the identification of goods in applicant's application and that of registrant's registration each list "aircraft" as separate products, such goods are considered to be "absolutely identical" and would accordingly be sold or leased through the same normal or usual channels of trade for those goods and would be directed to the same classes of customers. Therefore, if applicant's and registrant's "aircraft" were to be

We judicially notice, in this regard, that the term "aircraft" is defined, for example, by <a href="The American Heritage Dictionary of the English Language">The American Heritage Dictionary of the English Language</a> (4th ed. 2000) at 37 as "[a] machine or device, such as an airplane, helicopter, or dirigible, that is capable of atmospheric flight." It is well settled that the Board may properly take judicial notice of dictionary definitions. <a href="See">See</a>, <a href="English Language">English Language</a>, Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), <a href="afficient for Instance The Instance Content for Instance

marketed under the same or substantially similar marks, confusion as to the source or sponsorship thereof would be likely to occur.

Moreover, while it is still the case that both applicant's and registrant's "aircraft" are undoubtedly expensive products which would be marketed to highly sophisticated customers and would not be purchased or leased on impulse, we concur with the Examining Attorney that such facts do not preclude there being a likelihood of confusion as to origin or affiliation. Specifically, even allowing for the fact that "aircraft" are usually contracted for only after very careful consideration, it nevertheless is well settled that the fact that customers may exercise deliberation in choosing such products "does not necessarily preclude their mistaking one trademark for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). Here, it is plain that, if applicant's and registrant's "aircraft" were to be marketed under the same or substantially similar marks, even knowledgeable and sophisticated customers could be expected to attribute a common source thereto notwithstanding the high degree of care and deliberation typically exercised in the contracting for such goods. For instance, purchasers who are familiar or acquainted with certain aircraft marketed by registrant could reasonably believe, upon encountering applicant's jet aircraft or

its business and recreational jets, that either registrant had expanded its product line or that applicant is a subsidiary of registrant.

Turning, then, to consideration of the respective marks, applicant argues in its main brief that, contrary to the Examining Attorney's contention that they consist of or "contain the dominant and identifying literal term 'ATG,'" such "text elements are too commonly used to be distinctive or dominant." Relying on a declaration which it submitted from "Raymond Cassel ('Cassel'), a graphics design expert who designed Applicant's mark," applicant contends with respect to its mark and registrant's "ATG" and design mark that, "according to Cassel, the style of the two ATGs is significantly different" inasmuch as "registrant's ATG is short, fat and upright while that of the applicant is tall and slanted," with "a jet contrail [which] forms the 'A's' crossbar." Applicant, in addition, insists that as to such marks:

The dominant feature of the registered mark is the uplifting ellipse above the letters. Clearly, registrant intended the ellipse to represent an airship (blimp).

By contrast, the dominant feature of applicant's mark ... is the text "Aviation Technology Group, Inc." and "Performance at a Higher Level" which Cassel added to distinguish it from all the other "ATG" marks, which are quite common. In addition, the applicant's mark incorporates a jet and contrail, which are intended to represent that its business is speed.

The ATG in registrant's mark is secondary, at best. The dominant feature of applicant's mark, on the other hand, is a jet contrail, also representative of the applicant's products, jet aircraft. It is

meant to show, along with the motto "Performance at a Higher Level", that Aviation Technology Group's business is speed.

Applicant concludes, as set forth in its reply brief, that in view of the expert testimony by Mr. Cassel, who "is a graphic[s] designer with ten years experience" and whose "testimony under oath is uncontroverted," the Board "must find that the Applicant's trademark is distinctively different than that of the Registrant" and that there is consequently no likelihood of confusion between applicant's mark and registrant's "ATG" and design mark. Applicant, however, has essentially ignored registrant's "ATG" mark and the issue of likelihood of confusion with respect thereto, inasmuch as it has offered no argument with respect to the similarities and dissimilarities between such marks other than the generalized assertion that "[t]he Examining Attorney incorrectly dissected the marks piece by piece" instead of considering the marks in their entireties.

We agree with the Examining Attorney that, on the whole, the marks at issue are so substantially similar that, when used in connection with such legally identical goods as "aircraft," confusion as to the source or sponsorship thereof is likely. As the Examining Attorney properly points out in his

<sup>&</sup>lt;sup>8</sup> As to the "expert testimony" offered in Mr. Cassel's declaration with respect to the distinguishing features of applicant's mark and registrant's "ATG" and design mark, suffice it to say that it is well established that the opinions expressed by a witness (whether that of a layperson or an expert) on such an issue are not controlling or binding on the Board. See, e.g., Jones & Laughlin Steel Corp. v. Jones Engineering Co., 292 F.2d 294, 130 USPQ 99, 100 (CCPA 1961); and Quaker Oats Co. v. St. Joe Processing Co., Inc., 232 F.2d 653, 109 USPQ 390, 391 (CCPA 1956). In particular, the Board has stated that it is "the long-held view that the opinions of witnesses ... are

brief, the test for whether marks are confusingly similar is not whether they can be distinguished on the basis of a side-by-side The reason therefor is that such is not the ordinary comparison. way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. proper emphasis is accordingly on the fact that purchasers normally retain a general rather than a specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPO 573, 574 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPO 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

Moreover, while correctly noting in his brief that marks are to be considered in their entireties, including any design elements and/or any highly suggestive or descriptive matter, the Examining Attorney also properly observes that our principal reviewing court has indicated that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate

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entitled to little if any weight and should not be substituted for the opinion of the tribunal charged with the responsibility for the ultimate opinion on the question" of likelihood of confusion. Mennon Co. v. Yamanouchi Pharmaceutical Co., Ltd., 203 USPQ 302, 305 (TTAB 1979).

conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "that a particular feature is descriptive ... with respect to the involved goods ... is one commonly accepted rationale for giving less weight to a portion of a mark ...." Id.

Applying the above principles, it is readily apparent that the arbitrary term "ATG," which constitutes the entirety of one of registrant's marks, forms a very prominent, if not the dominant, portion of both applicant's "ATG AVIATION TECHNOLOGY GROUP, INC. PERFORMANCE AT A HIGHER LEVEL" and design mark as well as registrant's "ATG" and design mark. In particular, as the Examining Attorney accurately notes in his brief, the term "ATG" in applicant's mark "is written in significantly larger, bolded lettering," so that it stands out from the other features of the mark just as the bold style of lettering in registrant's "ATG" and design mark serves to display such term prominently. Moreover, as to registrant's "ATG" mark, the Examining Attorney correctly observes that because such mark is registered in typed format, it covers the display thereof in any reasonable stylization of lettering, including that utilized by applicant in its mark for the same term. See, e.g., Phillips Petroleum Co. v. C. J. Webb, Inc. 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) [a mark registered in typed format is not limited to the depiction thereof in any special form]; and INB National Bank v. Metrohost Inc., 22 USPQ2d 1585, 1588 (TTAB 1992) ["[a]s the Phillips

Petroleum case makes clear, when [an] applicant seeks a typed or block letter registration of its word mark, then the Board must consider all reasonable manners in which ... [the word mark] could be depicted"].

Furthermore, the additional words "AVIATION TECHNOLOGY GROUP, INC., " although forming a prominent part of applicant's mark, are descriptive of or otherwise lacking in distinctiveness with respect to applicant's goods, as evidenced by the disclaimer thereof (as well as their dictionary definitions which the Examining Attorney has made of record from The American Heritage Dictionary of the English Language (3d ed. 1992), and thus are of considerably less source indicating significance than is the arbitrary term "ATG," which is shared with registrant's marks "ATG" and "ATG" and design. In addition, the phrase "PERFORMANCE AT A HIGHER LEVEL, " while suggestive rather than descriptive of applicant's goods, is nonetheless clearly subordinate matter inasmuch as it appears beneath the term "ATG" in applicant's mark in a significantly smaller size, and a much less noticeable style, of lettering. Consequently, as indicated above, it is the arbitrary term "ATG" which forms a highly, if not the most prominent and hence dominant, portion of applicant's "ATG AVIATION TECHNOLOGY GROUP, INC. PERFORMANCE AT A HIGHER LEVEL" and design mark.

Moreover, as the Examining Attorney and applicant have also observed, applicant's mark and registrant's "ATG" and design mark each contain a prominent design feature which the Examining Attorney refers to as "a swerved band/line" in reference to

applicant's mark and which applicant calls an "uplifting ellipse" in discussing registrant's "ATG" and design mark. Regardless of the characterization thereof, such feature is substantially identical in appearance in both marks and serves to increase their overall similarity. While applicant, as noted earlier, maintains in the declaration from Mr. Cassel that marks which contain the term "ATG" are too commonly used to be distinctive enough to merit a broad scope of protection, applicant has offered only a few examples of such third-party marks and none of those provides an indication of the goods and/or services in connection with such marks are assertedly used. Thus, as the Examining Attorney points out in his brief, on this record "the terminology ATG is not diluted" inasmuch as "the only 3 marks which reference ATG in relation to aircraft goods/services are the applicant's mark and registrant's marks."

We therefore conclude that, when considered in their entireties, the marks at issue herein are so substantially similar in sound, appearance, connotation and commercial impression that customers for "aircraft," who are familiar or otherwise acquainted with registrant's marks "ATG" and "ATG" and design, could reasonably believe, upon encountering applicant's mark "ATG AVIATION TECHNOLOGY GROUP, INC. PERFROMANCE AT A HIGHER LEVEL" and design used in connection with "aircraft," that such goods emanate from or are sponsored by or affiliated with, the same source. In particular, even assuming that the knowledgeable and sophisticated consumers who would purchase or lease applicant's and registrant's "aircraft" would have occasion to

notice the differences in the respective marks, it is still the case that such differences are insufficient to preclude, for example, a likelihood of confusion among consumers in the sense of their believing, upon encountering aircraft manufactured by applicant, that either registrant had expanded its offering of aircraft or that applicant is a specialized subsidiary of registrant. Nevertheless, while we have no doubt as to our conclusion in this regard, if we were to entertain any possible doubt as to whether confusion is likely to occur, such doubt would have to be resolved in favor of the registrant. See, e.g., In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); and In re Pneumatiques Caoutchouc Manufacture et Plastiques Kelber-Columbes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Considering next the remaining basis for refusal,

Trademark Rule 2.71(a) provides that "[t]he applicant may amend
the application to clarify or limit, but not to broaden, the
identification of goods and/or services." As set forth in TMEP
Section 1402.06 (3d ed. 2d rev. May 2003), "[t]his rule applies
to all applications." The rule, moreover, has been strictly
interpreted. See, e.g., In re Swen Sonic Corp., 21 USPQ2d 1794,
1795 (TTAB 1991); and In re M. V Et Associes, 21 USPQ2d 1629,
1630 (Comm'r Pats. 1991). TMEP Section 1402.07(a) (3d ed. 2d
rev. May 2003) states, furthermore, that "[f]or the purpose of
determining the scope of an identification, the examining

attorney should consider the ordinary meaning of the wording apart from the class designation."

In addition, as more particularly indicated in TMEP Section 1402.06(a) (3d ed. 2d rev. May 2003):

If an applicant wishes to amend the identification of goods and services to insert an item that is equivalent to or logically encompassed by an item already included in the identification of goods and services, the examining attorney should permit the amendment, if it is timely and otherwise proper.

On the other hand, an applicant may not amend an identification of goods or services to add or substitute a term that is not logically included within the scope of the terms originally identified or that is otherwise qualitatively different from the goods and services as originally identified.

. . . .

The scope of the goods and services, as originally identified or as amended by an express amendment, establishes the outer limit for any later amendments. See TMEP §1402.07.

However, as further set forth in TMEP Section 1402.07(c) (3d ed. 2d rev. May 2003) (italics in original):

An applicant may amend an unambiguous identification of *goods* that indicates a specific type of goods to specify definite and acceptable identifications of *goods* within the scope of the existing terminology.

. . . .

An applicant may not amend a definite identification of goods to specify services, or vice versa. ....

As previously mentioned, the application when filed sought registration of applicant's mark in connection with goods identified as "aircraft" in International Class 12. The

Examining Attorney, in view thereof, argues in his brief that under Trademark Rule 2.71(a) and the pertinent sections of the <a href="Trademark Manual of Examining Procedure">Trademark Manual of Examining Procedure</a>, "the applicant may not amend [the application] to include any goods or services that are not within the scope of the goods or services set forth in the present identification," that is, the definite identification of goods set forth in the application when originally filed.

Specifically, the Examining Attorney contends in his brief that:

[B]ecause "aircraft" is a relatively broad term, the applicant is conceivably permitted to specify in greater detail its exact aircraft types. As such, the amended identification portions of "aircraft; jet aircraft, military manned and unmanned combat aircraft and business and recreational jets" are construed to be permissible (as providing greater specificity regarding the originally listed "aircraft." However, ... the listed "simulators for training pilots" in International Class 9, "civilian and military jet trainers" in International Class 12 and "educational services, namely, aircraft pilot training services" in International Class 41 constitute an unacceptable expansion of the original identification, as these are not "aircrafts."

Applicant, we note, has not addressed this basis for refusal in either of its briefs.

We concur with the Examining Attorney that applicant's present multiple class identification of goods is unacceptable

<sup>&</sup>lt;sup>9</sup> It is pointed out that the failure by an applicant to address a basis for a refusal or a requirement on appeal may itself be a sufficient reason to affirm such a refusal or requirement, irrespective of any other ground or grounds for refusing registration. <u>See</u>, <u>e.g.</u>, In re DTI Partnership LLP, 67 USPQ2d 1699, 1701-02 (TTAB 2003); In re Ridge Tahoe, 221 USPQ 839, 840 (TTAB 1983); and In re Big Daddy's Lounges Inc., 200 USPQ 371, 372 (TTAB 1978).

inasmuch as it is plain that "simulators for training pilots" in International Class 9 and "educational services, namely, aircraft pilot training services" are outside the scope of the term "aircraft," which was the sole item listed when the application was originally filed in International Class 12. Accordingly, and notwithstanding that we also find that, contrary to the Examining Attorney's contention, the phrase "civilian and military jet trainers" designates particular types of "aircraft" and thus is an acceptable clarification or addition to the identification of goods as originally set forth in International Class 12, 10 the amended identification of goods and services currently set forth is unacceptable because, by including "simulators for training pilots" in International Class 9 and "educational services, namely, aircraft pilot training services," it is beyond the scope of the application as originally filed.

Decision: The refusal under Section 2(d) as to the goods in International Class 12 and the refusal pursuant to Trademark Rule 2.71(a) and TMEP Sections 1402.06 and 1402.07 (3d ed. 2d rev. May 2003) as to the goods in International Class 9 and the services in International Class 41 are affirmed.

Third New International Dictionary (1993) at 2424 defines "trainer" as a noun meaning, inter alia, "f (1): an airplane used in training airmen; esp: one with duplicate controls used in training pilots," while The Random House Dictionary of the English Language (2d ed. 1987) likewise lists such term as signifying, among other things, "5. an airplane ... used in training aircrew members, esp. pilots."